FILED
APR 27 1992
OFFICE OF THE CLERK

No. 91-1354

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEROKEE NATION OF OKLAHOMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWARD J. SHAWAKER
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the United States breached a duty of "fair and honorable dealings" by making navigational improvements to the Arkansas River that damaged the Cherokee Nation's tribal property interests.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Aleut Community of St. Paul Island v. *United States*, 480 F.2d 831 (Ct. Cl. 1973)	5
Cherokee Nation v. *United States*, 782 F.2d 871 (10th Cir. 1986)	2
Confederated Tribes of the Colville Reservation v. *United States*, 20 Cl. Ct. 31 (1990)	4, 5, 7
Gila River Pima-Maricopa Indian Community v. *United States*:	
140 F. Supp. 776 (Ct. Cl. 1956)	5
427 F.2d 1194 (Ct. Cl.), cert. denied, 400 U.S. 819 (1970)	5, 7
9 Cl. Ct. 660 (1986), aff'd, 877 F.2d 961 (Fed. Cir. 1989)	5
Lipan Apache Tribe v. *United States*, 180 Ct. Cl. 487 (1967)	5
United States v. *Cherokee Nation*, 480 U.S. 700 (1987)	3, 7
United States v. *Goshute Tribe*, 512 F.2d 1398 (Ct. Cl. 1975)	5

Constitution and statutes:

U.S. Const.:	
Art. I, § 8, Cl. 3:	
Commerce Clause	7
Indian Commerce Clause	7
Amend. V	2

Statutes—Continued: Page

Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944 ..... 2, 4
Indian Claims Commission Act, 25 U.S.C. 70a *et seq.* (1976) 2
§ 2, 25 U.S.C. 70a 4
§ 2(5), 25 U.S.C. 70a(5) 4-5
§ 12, 25 U.S.C. 70k 4
§ 23, 25 U.S.C. 70v 4
28 U.S.C. 2509 7

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1354

CHEROKEE NATION OF OKLAHOMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 937 F.2d 1539. The order of the court of appeals denying rehearing (Pet. App. 18a-23a) is reported at 948 F.2d 635. The order of the district court (Pet. App. 24a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1991. A petition for rehearing was denied on October 25, 1991. Pet. App. 18a-23a. On January 3, 1992, Justice White extended the time for filing a petition for a writ of certiorari to and including February 24, 1992, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Cherokee Nation of Oklahoma, a federally recognized Indian tribe, owns a portion of the bed of the Arkansas River. Beginning in 1970, the Cherokee Nation petitioned Congress for compensation from the United States for damage to its riverbed interests allegedly caused by the United States' construction of the McClellan-Kerr Project, a major federal undertaking to improve the navigability of the Arkansas River. In 1982, Congress enacted special legislation authorizing the Cherokee Nation to bring an action in the United States District Court for the Eastern District of Oklahoma to determine "any claim which the Cherokee Nation * * * may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System [the McClellan-Kerr Project]." Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944. See Pet. App. 2a-3a.

The Cherokee Nation filed a complaint seeking compensation on the grounds that the United States' construction of the McClellan-Kerr Project: (1) violated the Fifth Amendment through a taking of the Tribe's riverbed interests; and (2) breached a duty recognized under the Indian Claims Commission Act to engage in "fair and honorable dealings." 25 U.S.C. 70a *et seq.* (1976). The district court concluded that the Project resulted in a taking of the Cherokee Nation's property for which compensation was required under the Fifth Amendment, and the court of appeals affirmed. See *Cherokee Nation* v. *United States*, 782 F.2d 871 (10th Cir. 1986). This Court reversed that decision, holding that the United States'

construction of the McClellan-Kerr Project was a lawful exercise of its navigational servitude and thus did not require the payment of compensation. *United States* v. *Cherokee Nation*, 480 U.S. 700 (1987). The Court (like the court of appeals and the district court) did not reach the fair and honorable dealings claim, and it remanded the case for further proceedings. *Id.* at 702 n.1, 708.

On remand, the Cherokee Nation reasserted that the United States had breached its duty of fair and honorable dealings. The district court rejected that contention. Pet. App. 24a-28a. The court explained that to establish a fair and honorable dealings claim, the Cherokee Nation must demonstrate that the United States owed it "a special obligation or undertaking," that the United States failed to meet its obligation, and that the Cherokee Nation was consequently damaged. *Id.* at 26a. The district court concluded that the Cherokee Nation "is unable to establish any special obligation on the part of the United States concerning compensation for the United States' exercise of its navigational servitude" and that "the absence of such an obligation is fatal to such claim." *Id.* at 27a.

The court of appeals affirmed. Pet. App. 1a-17a. It agreed with the district court that a fair and honorable dealings claim must be premised on the United States' assumption of a "special relationship" specifically related to the matter at issue. *Id.* at 5a-8a. It also agreed with the district court that "the Cherokee Nation 'has failed to show, and in fact cannot show, that the United States has assumed a special obligation to compensate plaintiff for the exercise of its navigational servitude.' " *Id.* at 9a. The court of appeals evaluated the record and concluded:

> We find no indication in the materials relied on that the government undertook to restrict the exercise of its navigational servitude in the Arkansas riverbed in question, or to compensate the Cherokee Nation for any of the effects of the navigation projects of the Arkansas River Navigation System.

Id. at 13a. See also *id.* at 21a-22a.

ARGUMENT

The Cherokee Nation contends that the lower courts erred in rejecting its "fair and honorable dealings" claim. That contention is incorrect. The decisions below correctly apply established law and do not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Congress has given the Cherokee Nation special permission to bring an action against the United States under Section 2 of the Indian Claims Commission Act of 1946, 25 U.S.C. 70a (1976). See Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944 (Pet. App. 29a-30a).* The Cherokee Nation has asserted its claim under Section 2(5), which affords Indian Tribes a cause of action against the United States for, inter

---

* Special legislation was necessary because Section 2 of the Indian Claims Commission Act limits the Act to claims accruing prior to the date of enactment (Aug. 13, 1946), 25 U.S.C. 70a (1976), and Section 12 provided that such claims must be brought within five years (by Aug. 13, 1951), 25 U.S.C. 70k (1976). Special legislation was also necessary to permit suit in the United States District Court for the Eastern District of Oklahoma. The Indian Claims Commission decided such claims until September 30, 1978, when the Commission was dissolved pursuant to Section 23 of the Act. See 25 U.S.C. 70v (1976). Pending claims were transferred to the Court of Claims and then to the Claims Court. See *Confederated Tribes of the Colville Reservation* v. *United States*, 20 Cl. Ct. 31, 33 (1990).

alia, "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. 70a(5) (1976).

The Cherokee Nation does not dispute that although Congress has excused it from complying with the timing and venue requirements of the Indian Claims Commission Act, the Cherokee Nation must still satisfy the substantive elements of a fair and honorable dealings claim. The Court of Claims has articulated, and the Cherokee Nation does not contest, the necessary elements:

> There must be a showing that the United States undertook an obligation, a "special relationship," the obligation was to the Tribe, that the United States failed to meet its obligation, and that as a result the Tribe suffered damages.

Aleut Community of St. Paul Island v. *United States*, 480 F.2d 831, 839 (Ct. Cl. 1973). See, *e.g.*, *United States v. Goshute Tribe*, 512 F.2d 1398, 1400-1401 (Ct. Cl. 1975); *Gila River Pima-Maricopa Indian Community* v. *United States*, 427 F.2d 1194, 1198 (Ct. Cl.), cert. denied, 400 U.S. 819 (1970); *Lipan Apache Tribe* v. *United States*, 180 Ct. Cl. 487, 502 (1967); *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 780-781 (Ct. Cl. 1956). The Claims Court, which is now responsible for the remaining cases under the Indian Claims Commission Act, adheres to that approach. *Confederated Tribes of the Colville Reservation* v. *United States*, 20 Cl. Ct. 31, 50 (1990); *Gila River Pima-Maricopa Indian Community* v. *United States*, 9 Cl. Ct. 660, 678 & n.26 (1986), aff'd, 877 F.2d 961 (Fed. Cir. 1989).

The court of appeals and the district court correctly applied this settled law governing fair and

honorable dealing claims. As those courts explained, the Cherokee Nation has failed to demonstrate that the United States has assumed a special obligation on which to base the particular fair and honorable dealings claim it raises. Specifically, those courts found "no indication in the materials relied on that the government undertook to restrict the exercise of its navigational servitude in the Arkansas riverbed in question, or to compensate the Cherokee Nation for any of the effects of the navigation projects of the Arkansas River Navigation System." Pet. App. 13a; see *id.* at 27a.

2. The Cherokee Nation challenges the lower courts' conclusion that there was no special relationship, and it attempts to prove the existence of such a relationship in this Court through a document entitled "Cherokee Historical Chronology" (which was not a part of the record below). Pet. 5-14; see Pet. App. 33a-50a. The Cherokee Nation contends that this chronology demonstrates "a mutual understanding of the Cherokee Nation's sovereign and proprietary authority over navigation and commerce in the Arkansas River." Pet. 6; see Pet. 7-12. It also argues that the United States' conveyance of the riverbed to the Tribe "necessarily implicates the navigational servitude in the special relationship between the United States and the Cherokee Nation." Pet. 12-14.

The Cherokee Nation's arguments fall far short of demonstrating the type of "special relationship" necessary for a fair and honorable dealings claim. As Judge Davis explained, the Indian Claims Commission Act

> was not designed to grant compensation for all the detriment accruing to the Indians by our ongoing policy toward them but, rather, had the more limited goal of paying for specific deprivations of land

> or property or rights protected by treaty, statute or then-existing law.

Gila River Pima-Maricopa Indian Community, 427 F.2d at 1200-1201 (Davis, J., concurring). The federal action at issue in this case is the United States' exercise of its navigational servitude, which "applies to *all* holders of riparian and riverbed interests." *Cherokee Nation*, 480 U.S. at 706. To establish a fair and honorable dealings claim based on the United States' exercise of its navigational servitude, the Cherokee Nation must first show that the United States specifically promised the Tribe that it would not exercise that power. See *Confederated Tribes*, 20 Cl. Ct. at 50. The mere showing that the Cherokee Nation shared regulatory authority over the Arkansas River and had an ownership interest in the riverbed does not demonstrate that the United States "in effect, consented to forego or restrict its historic rights under the Commerce Clause such that it was inhibited in the exercise of the navigational servitude, or bound to make compensation for the results of its exercise." Pet. App. 22a.

3. The Cherokee Nation challenges the court of appeals' decision on a number of other grounds, arguing that the assertion of the navigational servitude is inconsistent with fair and honorable dealings (Pet. 14-21), that there is a "conflict" between the Interstate Commerce Clause and the Indian Commerce Clause (Pet. 21-25), that the court of appeals' decision is inconsistent with principles of morality and justice (Pet. 25-27), and that the Indian Claims Commission Act should "provide at least as broad a basis for relief as" the congressional reference statute, 28 U.S.C. 2509 (Pet. 28-30). As the court of appeals recognized (Pet. App. 21a), those arguments are beside the point. The issue here is whether the Cherokee Nation has

stated a fair and honorable dealings claim. The lower courts applied the settled principle that a fair and honorable dealings claim must be predicated on a special obligation or relationship undertaken by the United States, and those courts correctly concluded that the Cherokee Nation failed to demonstrate such a special obligation or relationship in this case. The lower courts' shared conclusion on that factbound question is decisive and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWARD J. SHAWAKER
DIRK D. SNEL
Attorneys

APRIL 1992